LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 6 1966
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 836

COMMONWEALTH OF VIRGINIA, ex rel
Virginia State Bar,
Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

AUBREY R. BOWLES, JR.
AUBREY R. BOWLES, III
901 Mutual Building
Richmond, Virginia 23219
Counsel for the Petitioner

Richmond, Virginia
December 6, 1966

BLANK

PAGE

INDEX

Page

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA 1

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

THE CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

1. Subsequent Decisions Of State And Federal Courts 7

2. The Ambiguity Is Perpetuated By The Virginia Decision 14

3. The Brotherhood's Manifest Interpretation Of This Court's Opinion 19

4. The Question Is Of National Importance 22

CONCLUSION 23

Page

APPENDIX A

First and Fourteenth Amendments, United States Constitution 1

APPENDIX B

Opinion, Chancery Court of the City of Richmond, Jan. 15, 1965 1

Decree, Chancery Court of the City of Richmond, Jan. 15, 1965 15

Opinion, Supreme Court of Appeals of Virginia, June 13, 1966 19

Dissenting Opinion, Supreme Court of Appeals of Virginia, June 13, 1966 34

Judgment, Supreme Court of Appeals of Virginia, June 13, 1966 35

Order of Supreme Court of Appeals of Virginia Denying Rehearing, Sept. 9 1966 36

CITATIONS

Cases

Brotherhood of Railroad Trainmen v. Commonwealth, 207 Va. 182, 149 S.E. 2d 265 (1966) 2, 3

Page

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.ed 2d 89 (1964) 2, 3, 4, 6, 7, 12, 19

Dombey, Tyler, Richards & Greiser v. D. T. & I. R. Co., (C.A. 6-Sept. 1965) 351 F. 2d 121 ..... 11, 22

Illinois State Bar Assoc. v. United Mine Workers of America (1966), 35 Ill. 2d 112, 219 N.E. 2d 503 ..... 7, 10

F. Leland Jones, No. 47,788, S.Ct. of Mo., Jan. 10, 1966, No. 190 Misc., 87 S. Ct. 126 ..... 7, 8

State v. Williams (1966-Fla.), 183 So. 2d 537 ..... 7, 9

CONSTITUTION AND STATUTE

First and Fourteenth Amendment, United States

§54-78(c) Va. Code, 1950, as amended 1964 16

BLANK

PAGE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No.

COMMONWEALTH OF VIRGINIA, ex rel
Virginia State Bar,
Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case on June 13, 1966.

OPINIONS BELOW

The opinion of the Chancery Court of the City of Richmond, filed January 15, 1965, (R. Vol. A, pp. 12-22) is unreported and is printed in Appendix B hereto, *infra*, pp. 1-14. The decree thereon of the Chancery Court of the City of Richmond entered January 15, 1965, (R. Vol. A, pp. 22-25) is printed in Appendix B hereto, *infra*, pp. 15-19.

The majority and dissenting opinions of the Supreme Court of Appeals of Virginia, filed June 13, 1966 (R. Vol. A, pp. 36-53, 54-56), printed in Appendix B hereto, *infra*, pp. 19-33, 34-35, are reported in 207 Va. 182, 149 S.E.2d 265.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered June 13, 1966. (R. Vol. A, p. 57; Appendix B hereto, *infra*, pp. 35-36). Rehearing, applied for by both the Brotherhood of Railroad Trainmen and by the Virginia State Bar on July 13, 1966, was denied to each on September 9, 1966. (R. Vol. A, pp. 58, 59, 60, 61; Appendix B hereto, *infra*, pp. 36-37). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), since the right of the Commonwealth of Virginia to enjoin the Brotherhood of Railroad Trainmen "from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property", is drawn in question on the grounds of repugnancy to the First and Fourteenth Amendments to the Constitution of the United States as construed by this Court in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 84 S. Ct. 1113, 12 L.ed. 2d 89 (1964).

QUESTION PRESENTED

Does the majority opinion of this Court rendered April 20, 1964 (R. Vol. A, pp. 2-7) in *Brotherhood of Railroad*

Trainmen v. *Virginia*, 377 U.S. 1, 84 S. Ct. 1113, 12 L.ed 2d 89 (1964), and the judgment thereon extend the protection of the First and Fourteenth Amendments to the Constitution of the United States to the solicitation of legal business by the Brotherhood, its members, agents and employees for its selected lawyers or did that opinion intend to approve only the right to recommend such attorneys? Does Virginia have the power to enjoin when *recommendation* becomes *solicitation?*

THE CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States which are printed in Appendix A, hereto, *infra*, p. 1.

STATEMENT OF THE CASE

On January 29, 1962, the Chancery Court of the City of Richmond, Virginia, enjoined the Brotherhood of Railroad Trainmen, among other things, "* * * from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; * * * or in any other manner soliciting or encouraging such legal employment of the selected lawyers; * * * and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers * * *." (R. Vol. B-1, pp. 25-28). On June 12, 1962, the Supreme Court of Appeals of Virginia affirmed that decree (R. Vol. B-1, p. 35). Rehearing was denied and final judgment in that court was rendered on

August 31, 1962 (R. Vol. B-1, p. 36). On certiorari to that judgment of affirmance a majority of this Court decided on April 20, 1964: "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers" (R. Vol. A, p. 7). *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, 8, 84 S. Ct. 1113, 1118, 12 L.ed 2d 89, 94 (1964). Justices Clark and Harlan dissented. 377 U. S. at p. 9, 84 S. Ct. at p. 1118, 12 L.ed 2d at p. 95. Justice Stewart took no part in the decision. Rehearing was denied by this Court, 377 U.S. 960, 84 S. Ct. 1625, 12 L.ed 2d 505, and the cause was on June 2, 1964, remanded for further proceedings not inconsistent with the opinion of April 20, 1964. (R. Vol. A, pp. 10-11).

Pursuant to the mandate of this Court and the succeeding mandate of the Supreme Court of Appeals of Virginia entered June 17, 1964 (R. Vol. A, pp. 11-12), the Chancery Court of the City of Richmond, Virginia, reheard this matter on the same evidence (R. Vols. B-1, 2, 3, & 4) in the light of this Court's opinion of April 20, 1964. On January 15, 1965, the Chancery Court of the City of Richmond rendered its opinion thereon (R. Vol. A, pp, 12-22; Appendix B hereto, *infra,* pp. 1-14), and entered a revised and amended decree (R. Vol. A, pp. 22-25; Appendix B hereto, *infra,* pp. 15-19) which it deemed was consistent with the majority opinion of this Court rendered by Justice Black on April 20, 1964.

The revised and amended decree of the Chancery Court of the City of Richmond, Virginia, omitted all of those parts of its prior decree of January 29, 1962, to which the

Brotherhood objected and which were quoted in the opinion of this Court rendered April 20, 1964, as the offending parts of that decree (R. Vol. A, at p. 4), and substituted therefor the following:

> "* * *; from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property; * * * from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; * * *.
>
> "But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. * * *." (R. Vol. A, pp. 24-25; Appendix B hereto, *infra*, pp. 17-18).

Appeal by the Brotherhood from the revised decree of the Chancery Court of the City of Richmond was allowed by the Supreme Court of Appeals of Virginia. The opinion (R. Vol. A, pp. 36-53; Appendix B, *infra*, pp. 19-33) and

order of that court to which this application for certiorari is made (R. Vol. A, p. 57; Appendix B, *infra*, pp. 35-36) were then rendered.

Five members of the Supreme Court of Appeals of Virginia interpreted the majority opinion of this Court by Justice Black in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U. S. 1, 84 S. Ct. 1113, 12 L.ed 2d 89 (1964), as denying Virginia's right to restrain the Brotherhood's "activities in 'soliciting or encouraging . . . legal employment . . . of lawyers [selected by the Brotherhood]'" (R. Vol. A, p. 47; Appendix B hereto, *infra*, at p. 29; 207 Va., at p. 189, 149 S.E.2d at p. 270). One member of the Virginia Court dissented on the ground that: "I do not agree that the labor union involved in this case should be permitted to solicit legal business for its sixteen regional counsel and I cannot believe that the United States Supreme Court ever intended such a result to ensue" (R. Vol. A, p. 54; Appendix B hereto, *infra*, at p. 34; 207 Va. at p. 192, 149 S.E.2d at p. 272). One member of the Virginia Court did not participate in the opinion (R. Vol. A, p. 36; Appendix B hereto, *infra*, at p. 19; 207 Va. 182, 149 S.E.2d, at p. 266).

Other courts, both State and Federal have indicated, we submit, that they interpret the majority opinion of this Court rendered April 20, 1964, in *Brotherhood of Railroad Trainmen* v. *Virginia*, *supra*, in the same way that the Chancery Court of the City of Richmond did (R. Vol. A, pp. 12-25; Appendix B hereto, *infra*, pp. 1-14), that is to say that the protection of the First and Fourteenth Amendments to the Constitution of the United States extends only to such activities of the Brotherhood as come within the repeated description of them by Justice Black in his

opinion as a plan "for advising workers who are injured to obtain legal advice and for recommending specific lawyers." *In re F. Leland Jones,* No. 47,788, Supreme Court of Missouri, decided Jan. 10, 1966, certiorari denied by this Court on Oct. 10, 1966, No. 190 Misc., 87 S. Ct. 126; *Illinois State Bar Assoc.* v. *United Mine Workers of America* (1966), 35 Ill 2d 112, 219 N. E. 2d 503; *State* v. *Williams* (1966-Fla.), 183 So. 2d 537, certiorari denied by this Court on Oct. 10, 1966, No. 160 Misc., 87 S. Ct. 42; *Dombey, Tyler, Richards & Greiser* v. *D. T. & I. R. Co.* (C.A. 6-Sept. 1965), 351 F.2d 121.

The matter is one of national importance to a proper understanding of what constitutes the unauthorized practice of law and to the maintenance of ethical standards among the lawyers of this nation. It is not clear whether this Court meant to say that the Brotherhood may engage in activities that amount to the active solicitation of legal business for its selected lawyers as that term is understood and defined, or, only, as it did say, that the plan so protected by the First and Fourteenth Amendments is a plan for "advising workers who are injured to obtain legal advice and for recommending specific lawyers" only.

The Court has the jurisdiction to clarify this most important question which now stands in doubt.

REASONS FOR GRANTING THE WRIT

1. Subsequent Decisions of State and Federal Courts.

The majority decision of this Court in *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U. S. 1, 84 S. Ct. 1113, 12 L.ed 2d 89 (1964), has been relied on in several cases since April 20, 1964.

In re: F. Leland Jones, No. 47,788, Sup. Ct. of Mo., Jan. 10, 1966, cert. denied, No. 190 Misc., 87 S. Ct. 126, was a disbarment proceeding against a St. Louis lawyer who associated himself with a plan devised by a Cincinnati layman for the solicitation of legal business quite similar to the plan of the Brotherhood. The lawyer relied upon the free-speech right of the Cincinnati layman to recommend him, the client's free-speech right to follow that recommendation and his free-speech right to accept the employment arising from that recommendation. In affirming the lawyer's suspension the Supreme Court of Missouri said:

> "* * * He cites N. A. A. C. P. v. Button, 371 U. S. 415, and B. R. T. v. Virginia, 377 U. S. 1. In N. A. A. C. P. v. Button the United States Supreme Court upheld the right of the N. A. A. C. P. to solicit plaintiffs to designate N. A. A. C. P. staff attorneys to represent them in legal proceedings to achieve desegregation. In B. R. T. v. Virginia, the United States Supreme Court upheld the right of the Brotherhood of Railroad Trainmen to advise injured workers to obtain legal advice, to recommend specific attorneys, and upheld the rights of lawyers to accept employment under such circumstances. See Washington University Law Quarterly, June 1965, pp. 313-334.
>
> "We will not expand these rulings beyond the facts in those cases. It is accurate to say that any layman has a right to recommend a lawyer, any injured person has a right to accept such recommendation, and any lawyer has a right to accept employment in a proper set of circumstances. We also recognize some difficulty in reconciling traditional concepts of proper ethical conduct on the part of lawyers with the needs of people

in our modern society. However, *the facts in this case evidence practices we cannot condone.*" (Italics ours).

In *State* v. *Williams* (Fla. 1966), 183 So. 2d 537, cert. denied, Oct. 10, 1966, No. 160 Misc., 87 S. Ct. 42, the lawyer involved relied upon the Brotherhood decision by a majority of this Court to support his claim that the Florida statute against solicitation was unconstitutional. The Florida court said:

> "He cites Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U. S. 1, 87 S. Ct. 1113, 12 L.ed 2d 89, to the effect a labor union could not be enjoined by a state bar association from advising its injured members to obtain legal advice from specific lawyers it recommended. National Association for Advancement of Colored People v. Button, 371 U. S. 415, 83 S. Ct. 328, 9 L.ed 2d 405, is cited also; it held a statute unconstitutional which made it a crime for a person to advise another that his legal rights have been infringed and refer him to a particular attorney.
>
> Section 877.02(1) does not appear to us to be unconstitutionally vulnerable on the bases of the challenges urged by petitioner.
>
> The object of §877.02(1) is to prohibit the solicitation of legal business by an attorney directly or by his agent or employee, or by another acting in his behalf. It does not prohibit the recommendation of an attorney by anyone to another where the one recommending has no relationship or privity with the attorney as the latter's agent or as his employee or other similar rela-

tionship with the attorney for the purpose of soliciting legal business for him. Thus the statute does not prohibit the recommendation of an attorney by a mere volunteer or acquaintance who has no prior and continuing relationship as agent or employee or similar status with the attorney recommended which contemplates solicitation of legal business for the attorney."

In *Illinois State Bar Assoc.* v. *United Mine Workers of America* (1966), 35 Ill. 2d 112, 219 N.E. 2d 503, the question at issue was the right of the union to employ and pay counsel to represent its members before the Industrial Commission. In deciding that the decision of this Court in the Brotherhood Case did not protect the employment of counsel to represent its members, that court said:

"In *Virginia Railroad Trainmen* the court held that 'the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall.' 377 U. S. at p. 8, 84 S. Ct. at p. 1118.

"The court there (377 U. S. 5, n. 9, 84 S. Ct. 1113.) specifically pointed out that the railroad trainmen were objecting to only those portions of the decree encompassed by the language of the holding, as the brotherhood had denied that it was engaging in practices forbidden by our decree in In Re Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163. * * *

> The circuit court decree in question here does not attempt to restrain the union from advising its members to seek legal advice or from recommending particular attorneys thought competent to handle workmen's compensation claims."

Dombey, Tyler, Richiards & Greiser v. *D. T. & I. R. Co.* (C. A. 6), 351 F.2d 121 (1965), has peculiar significance. The Sixth Circuit Court of Appeals had before it the very distinction here under consideration. The railroad in that case settled with an injured employee notwithstanding knowledge that he had signed a contract with a Regional Counsel of the Brotherhood. In the action by that law firm for its agreed fee of 25%, the railroad defended on the ground that the representation contract was "vitiated by the manner in which the Brotherhood local chairman recommended plaintiff's services". 351 F.2d at p. 126. Two separate Brotherhood legal counsel were involved in that case. The hired investigator of the Chicago law firm of Henslee, Monek and Henslee (the very same law firm which has appeared as counsel for the Brotherhood throughout this litigation) solicited the injured employee to hire that firm. After "some five visits * * * at the hospital and at his home" the investigator for Henslee, Monek and Henslee "was unable to get the business for his Chicago principals." The Brotherhood's local chairman *recommended* the Dombey firm and with the injured man's consent brought that firm in contact with him.

In is most-significant that the *solicitation* in that case on behalf of Henslee, Monek and Henslee (counsel of record here) took place on October 11, 1960, more than eighteen months after April 1, 1959, the day on which

the Brotherhood claimed to have ceased all of the practices theretofore admitted by it to be improper and illegal. That is additional recorded proof that the *solicitation* of legal business pursuant to the plan had not in fact changed and that the *solicitation* part of the plan as originally conceived and implemented was at least still in effect. The Brotherhood now contends, as we shall presently show, that the majority opinion of this Court "decides that the Brotherhood's plan throughout its operation of 1930 until the date of the decree was constitutionally protected."

In deciding that the right of the Dombey firm to recover its contractual contingent fee was not vitiated by the *recommendation* of the Brotherhood's local chairman, the Sixth Circuit Court said:

"In Brotherhood of R. R. Trainmen v. Virginia ex rel. State Bar, 377 U. S. 1, 8, 84 S. Ct. 1113, 1118, 12 L.ed 2d 89 (1964), the Supreme Court determined that the Brotherhood is constitutionally protected in carrying out its plan 'for advising workers who are injured to obtain legal advice and for recommending specific lawyers.'" 351 F.2d at p. 126.

That Court also said that any contrary view as to the legality of the retainer "is foreclosed by this decision". 351 F.2d at p. 128.

The case was remanded, however, for further proceedings on the issue of maintenance.

The facts of that case recited by the Sixth Circuit illustrate the distinction between solicitation and recommendation as laid down by this Court in the Brotherhood Case.

The Sixth Circuit obviously did not approve the unsuccessful solicitation of that case by Henslee, Monek and Henslee's investigator:

> "Shortly after Craig's injuries, a report of his accident went to the Grand Lodge of the Brotherhood of Railroad Trainmen. This was promptly followed by a series of visits by one Taylor who was then an 'investigator' for a Chicago law firm, Henslee, Monek and Henslee, and who solicited Craig to hire that firm to handle whatever claim Craig might have against the defendant railroad. The Chicago lawyers were among the Brotherhood's designated regional counsel. Notwithstanding some five visits to Craig at the hospital and at his home, Taylor was unable to get the business for his Chicago principals. Taylor requested Craig to write a letter to the Chicago firm asking them to come and see him. Craig refused. Thereafter Crawford, the local representative of the Brotherhood, continued to visit Craig, who asked concerning his hospital and doctor bills 'and stuff like that' and requested that Crawford arrange for him to talk to somebody from the Lodge about these matters. Although Craig did not ask Crawford to get him a lawyer, Crawford asked Craig if he would see someone from the office of the plaintiff law firm. Craig agreed and Crawford brought plaintiffs Dombey and Richards to the Craig home on November 14. Dombey's firm was identified as being regional counsel for the Brotherhood. At this meeting, Dombey and Richards discussed matters with Craig and finally entered into an agreement giving their firm the exclusive right to prosecute Craig's claim and providing that the firm was to get 25% of

any sum received through suit or settlement, 'in consideration of services rendered.'"

It is proper, however, to point out that the Sixth Circuit opinion did indeed characterize the particular actions of the local chairman in that case as "solicitation", though we respectfully submit that by so doing the court did not alter the clear distinction previously indicated by it between the solicitation of legal business for lawyers as the term is commonly understood, and the recommendation of a lawyer:

> "We have already observed that the Supreme Court's decision in Brotherhood of R. R. Trainmen v. Virginia ex rel. State Bar, 377 U. S. 1, 84 S. Ct. 1113, 12 L.ed 2d 89 (1964), protects plaintiff's representation contract against a defense of invalidity based upon the solicitation of Dombey's employment by a representative of the Brotherhood of Railroad Trainmen." 351 F. 2d at p. 128.

2. The Ambiguity Is Perpetuated By the Virginia Decision.

The ambiguity created by this Court's decision in *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U. S. 1, 84 S. Ct. 1113, 12 L.ed 2d 89 (1964), is in fact carried forward in some degree by the decision of the Supreme Court of Appeals of Virginia in *Brotherhood of Railroad Trainmen* v. *Commonwealth,* 207 Va. 182, 149 S.E. 2d 265 (1966), from which the writ of certiorari is sought (R. Vol. A, pp. 36-53; Appendix B hereto, *infra,* pp. 19-33).

The Virginia Court plainly recognized the distinction between "the right to recommend" and "the solicitation of legal employment". It then said:

> "But the Court's characterization of the Brotherhood's activities as 'recommending' does not justify the narrow interpretation advocated by the State Bar. The Court's opinion forbids restraint of activities held constitutionally protected. We must leave the Brotherhood free to pursue these activities, however they may have been characterized by the Supreme Court or may be characterized under Virginia law." (207 Va. at p. 188-189; 149 S.E. 2d at p. 270; Appendix B hereto, *infra*, pp. 28-29).

But the Virginia court was no more helpful than the opinion of Justice Black in determining whether the Brotherhood may *solicit* legal business for its counsel as opposed to *recommending* such counsel when it described the constitutionally protected plan of the Brotherhood exactly as did Justice Black:

> "As a recognized in the opinion, the Brotherhood carries out its activities pursuant to an established plan. The plan is obviously designed to channel legal employment to lawyers selected by it. In carrying out the plan, the Brotherhood seeks out each injured trainman or a member of his family. It not only gives general advice about the wisdom of engaging counsel, but also *recommends* the employment of specific Regional Counsel selected by the Brotherhood." (Italics ours. 207 Va. at p. 189; 149 S.E. 2d at p. 270; Appendix B hereto, *infra*, p. 29).

That is exactly what the revised decree of the Chancery Court of the City of Richmond says that the Brotherhood may do. It also says what the Brotherhood may not do: that it may not *solicit* employment for its selected lawyers as that term is used in the canons and the statutes.

But the opinion of the Virginia Supreme Court of Appeals also states:

> "The Supreme Court expressly sustained the Brotherhood's objection to the restraint against its activities in 'soliciting or encouraging . . . legal employment . . . of lawyers [selected by the Brotherhood]'. While sustaining this objection, the Court recognized that the Brotherhood was asking protection from restraint of activities that admittedly resulted in the channeling of legal employment to particular lawyers. * * *
>
> "We interpret the opinion as denying the State's right to restrain these activities." (207 Va., at p. 189; 149 S.E. 2d at p. 270; Appendix B hereto, *infra*, p. 29).

After noticing that the Virginia "running and capping" statute[1] provides that conduct limited to mere statements

---

[1] §54-78(c), Va. Code, 1950, as amended 1964, is as follows: "(c) *'Solicitation of professional employment'* is the obtaining or attempting to obtain for an attorney at law representation of some other person to render legal services for such other person and whereby such attorney at law will or may receive compensation; provided that neither conduct limited to mere statements of opinion respecting the ability of a lawyer, nor conduct pursuant to a uniform legal aid or lawyer referral plan approved by the Virginia State Bar, shall be deemed the solicitation of professional employment."

of opinion respecting the ability of a lawyer is not the solicitation of professional employment, the Virginia Supreme Court of Appeals further said:

> "Whether or not the Brotherhood confines its words to those or recommendation, its conduct includes far more than 'mere statements of opinion respecting the ability of a lawyer'. Its activities, designed to obtain representation for specific lawyers, are illegal under the statute proscribing running and capping. * * * The statute authorizes the injunction entered by the Chancellor but the injunction must yield to the mandate of the Supreme Court.
>
> "We do not rule out the applicability of Virginia law regulating the practice of law, including the running and capping statute, in other cases. We only hold that these laws cannot be invoked against the Brotherhood in this case because of the mandate of the Supreme Court." 207 Va., at p. 190, 149 S.E. 2d, at p. 271; Appendix B hereto, *infra*, p. 31.

The Virginia court also did not rule out the applicability of Virginia laws and Canons in proceedings against the Brotherhood's Regional Counsel or any other lawyer and the power of the state "to enjoin or discipline attorneys who are parties to solicitation of their employment." 207 Va., at p. 191, 149 S.E. 2d at p. 271; Appendix B hereto, *infra*, p. 32.

It is also significant that the opinion of the Virginia Supreme Court of Appeals did not strike down that portion of the revised decree of the Chancery Court of the City of Richmond, (R. Vol. A, at p. 24; Appendix B hereto, *infra*,

at p. 17) which enjoined the Brotherhood "from informing any lawyer or lawyers or any person whomsoever that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer." 207 Va., at p. 191, 149 S.E. 2d, at p. 271; Appendix B hereto, *infra*, pp. 32-33. On that specific point the Virginia Court said:

> "This injunction is directed against the furnishing of information for the purpose of enabling lawyers to solicit legal employment. The majority opinion upholds the workers' 'constitutionally guaranteed right to assist and advise each other' * * *. *It does not, in our opinion, give the Brotherhood the right to take action that is designed to enable lawyers to solicit employment.* We therefore overrule the Brotherhood's objection, except insofar as it relates to the words 'or any other person whomsoever'. After those words are deleted, the injunction will clearly restrain only actions designed to assist lawyers in running and capping for themselves." (Italics ours. 207 Va., at p. 191, 149 S.E. 2d at p. 271; Appendix B hereto, *infra*, p. 33).

What is then the result as to what activities of the Brotherhood may be enjoined under this Court's majority opinion of April 20, 1964, and what may not?

Only the decree of the Chancery Court of the City of Richmond last entered on January 15, 1965 (R. Vol. A, pp. 22-25; Appendix B hereto, *infra*, pp. 15-19) says plainly that the Brotherhood may recommend selected lawyers but may not solicit legal business for them. That decree presents squarely the issue whether this Court's intention has been

properly interpreted, an issue not now clear and of sufficient national importance to be clarified.

3. The Brotherhood's Manifest Interpretation of this Court's Opinion.

The Brotherhood has several times plainly stated its interpretation of this Court's opinion rendered April 20, 1964, in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U. S. 1, 84 S. Ct. 1113, 12 L.ed 2d 89. In its brief and argument before the Supreme Court of Appeals of Virginia the Brotherhood contended:[2]

> "* * * When that opinion is read in its entirety, * * *, it is clear that the Supreme Court of the United States was not dealing in a vacuum of mere advice and recommendation but was specifically approving the plan and program of the Brotherhood of Railroad Trainmen, including the resulting channeling of legal employment to the counsel chosen by that organization. The Court specifically points out in footnote 9 of the majority opinion that it did not reach the Brotherhood's claim that the findings of the Court were not supported by substantial evidence and *thereby it decides that the Brotherhood's plan throughout its operation of 1930 until the date of the decree was constitutionally protected.* What the majority opinion does do is to state on the identical record considered by the court below that neither commercialization of the legal profession,

[2] The Brotherhood's Petition for Appeal and Supersedeas to the Supreme Court of Appeals of Virginia from the January 15, 1965, decree of the Chancery Court of the City of Richmond, Record No. 6229, adopted as its opening brief therein, at pp. 15-16.

'ambulance chasing', nor the unauthorized practice of law was involved in the plan and the program shown in the record and found by the Chancery Court in its 1962 decree." (Italics ours).

In the same petition to the Supreme Court of Appeals of Virginia, the Brotherhood further contended:[3]

> "* * * In the *Brotherhood* v. *Bar, supra,* the court determined that the activities of the Brotherhood were constitutionally protected, while *asking, enticing, urging, requesting or soliciting* its members, their families, in respect to any claim for personal injury, death or in relation to property, for its Regional or Legal Counsel, or any other lawyer, when such personal injuries or death arose under the Federal Employers' Liability Act, the Safety Appliance Act, or other Federal acts for the protection of the Brotherhood's members." (Italics ours).

And again the claim is made that its past conduct, though unnecessarily changed, was also protected by this Court's opinion:[4]

> "The evidence submitted by the Bar, which is summarized in this brief, does not show that the Brotherhood is still adhering to the pattern formulated and implemented in 1930. The President of the Brotherhood testified, it no longer has contracts with Legal Counsel with reference to the amount of fees to be

[3] Idem, p. 26.

[4] Idem, p. 49.

charged members and families of deceased members, and further that the Brotherhood is in compliance with the Illinois opinion.

> *"These changes may have been unnecessary since at the time this plan was formulated and put into practice it was constitutionally protected,* although no court had passed on the question until the case of *Brotherhood* v. *Bar, supra* (1964)" (Italics partly ours).

The Brotherhood has thus openly claimed before the Supreme Court of Appeals of Virginia that its plan and its practices thereunder for the past 30 years have been approved by the majority opinion of this Court rendered April 20, 1962.[5] That is exactly what this petitioner predicted in its petition to this Court for rehearing of that decision would be the Brotherhood's contention.[6]

Moreover, the Brotherhood also applied to the Supreme Court of Appeals of Virginia for a rehearing of its decision of June 13, 1966,[7] asserting that the duty of that Court was "to vacate the decree [of January 29, 1962] and dismiss the complaint" altogether and that its refusal to do so was "contrary to and inconsistent with the decisions of the Supreme Court of the United States in this case and in

---

[5] 377 U.S. 1, 84 S.Ct. 1113, 12 L.ed 2d 89.

[6] Petition For Rehearing filed in this Court by the Virginia State Bar and denied June 1, 1964. R. Vol. D; 377 U.S. 960, 84 S. Ct. 1625, 12 L.ed 2d 505 (1964).

[7] Petition For Modification of Opinion on Rehearing filed by Brotherhood of Railroad Trainmen on July 13, 1966. R. Vol. A, p. 59.

the case of *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963)." It was there argued that parts of the opinion of the Virginia Supreme Court "cast a doubt upon the right of the selected lawyer to do anything more than 'merely accept' the employment. Furthermore, this Court's statement that lawyers are subject to injunction or discipline when they are 'parties to solicitation of their unemployment' is one which could be used to create a contest over each retainer as to whether the conduct of the attorney amounted to 'acceptance' or amounted to 'becoming a party to solicitation'. * * * In other words, it is submitted that the state has failed to show any 'substantive evils' in a record which fails to establish that any of the selected counsel were using the Brotherhood plan as a subterfuge whereby they could actively solicit cases for themselves."

Not only does the history of the plan for the past thirty years disclosed by the record in this case show the exact contrary, but the opinion in *Dombey, Tyler, Richards & Grieser* v. *Detroit T. & I. R. Co.* (C.A. 6), 351 F.2d at pp. 122-123, establishes clearly that the abuses continue.

The Brotherhood's Petition For Rehearing further asserts that the decision of the Supreme Court of Virginia rendered on June 13, 1966, fails "to give the Brotherhood's constitutional rights the 'breathing room' required by the Constitution."

4. The Question is Of National Importance.

The question here involved is one of great national importance. It is a simple one: Can the Brotherhood, its members, agents and employees solicit legal business for

its selected lawyers in a manner that amounts to running or capping? How far can a lay agency such as the Brotherhood of Railroad Trainmen and its members, agents and employees go in undertaking to insure that the personal injury and death claims of its members are channeled into the hands of lawyers deemed by it competent to handle such claims? Where is the proper balance between the obvious "right of members to consult with each other in a fraternal organization * * * to select a spokesman from their number who could be expected to give wise counsel * * * to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on * * *" and the right of a State to control the obvious abuses of those constitutional rights by exercising the "broad powers to regulate the practice of law within its borders" which this Court recognized in its majority opinion that Virginia, like all other states, "undoubtedly has".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

AUBREY R. BOWLES, JR.
AUBREY R. BOWLES, III
901 Mutual Building
Richmond, Virginia 23219
Counsel for the Petitioner

Richmond, Virginia
December 6, 1966

BLANK

PAGE

APPENDIX A

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

BLANK

PAGE

APPENDIX B

VIRGINIA:

IN THE CHANCERY COURT OF THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA, *ex rel.* VIRGINIA STATE BAR

v.

BROTHERHOOD OF RAILROAD TRAINMEN

OPINION OF THE COURT

The Bill of Complaint was filed on June 29, 1959, in the name of the Commonwealth of Virginia at the relation of Virginia State Bar, which is an administrative agency of the Commonwealth of Virginia, composed of all lawyers licensed to practice law in the state, and which has the duty to investigate and report violations of statutes and the Canons of Professional Ethics concerning the practice of law within this state. The defendant is an unincorporated trade union operating in all of the states of the union and in the City of Richmond, Virginia. The complainant contends that acts of the respondent are contrary to and violative of the Code of Virginia of 1950, as amended, specifically, §§54-42, 54-44, 54-51, 54-52, and 54-83.1 and the Definitions of the Practice of Law adopted by the Supreme Court of Appeals of Virginia (pursuant to §54-48) (201 Va. lxxxv, the Common Law, and Canons of Ethics of the American Bar Association, adopted in this state.

This cause is before this court again pursuant to the order of the Supreme Court of Appeals of Virginia, which

remanded it for further action not inconsistent with the opinion of the Supreme Court of the United States, handed down on April 20, 1964.

The remand to this court is deemed by the Brotherhood to require the review of the evidence, and I have read the testimony and examined numerous exhibits in the four volumes of the printed record which were before the Supreme Court of the United States. The evidence is replete with direct testimony and documents, and the testimony and opinions in other courts on the prosecutions of and injunctions against Brotherhood, and its Counsel, investigators, solicitors for counsel, and consent decrees involving the Brotherhood and its Counsel, reprimands to Counsel, and certain financial records from the national office in Cleveland. There are also agreements by B. R. T. Counsel not to violate the Canons of Legal Ethics. The findings of fact by my able predecessor in this court, Judge Brockenbrough Lamb, speak as of the date of the decree, January 29, 1962, although the hearing was concluded earlier, and include acts both prior and subsequent to April 1, 1959, which is the cleavage date between the "former" and the "reformed" practices of the Brotherhood, as claimed by it.

The Legal Aid Bureau (later Legal Aid Department) was created in 1930 to aid the worker because, in the words of its organizers, "Lawyers were taking advantage of them." Its operation was essentially similar to the allegations in the complaint, except that it then furnished legal advice. The Brotherhood has never considered itself guilty of any wrong-doing from that day to the present. Its chief counsel testified on January 5, 1932, "I don't think a great deal of *odium* attaches to ambulance chasing—I consider

it unethical, but I mean from a purely moral standpoint" (Re: *Petition of the Committee on Rule 28,* Court of Appeals, Cuyahoya Co., Ohio).

On June 15, 1946, A. F. Whitney, then National President, wrote a letter addressed to "All Regional Counsel" advising them that neither the Brotherhood nor any department or bureau thereof is financially interested in any cases then pending or to be filed by them against common carriers, and that no part of any fee received was anticipated or would be received by the Brotherhood. There does not appear to have been any change in the operation of the Legal Aid Department as the result of this directive, as shown by evidence of prior and subsequent acts.

The Brotherhood cannot deny that the evidence shows that the operation of the Legal Aid Department, designated the Department of Legal Counsel after January 1, 1959, was in the manner alleged in the bill of complaint. Its investigators worked on several different bases of compensation: flat fees, salaries, or commissions, or combinations of each. Counsel charged Brotherhood members 25 per cent of recoveries, whether by suit or settlement, while nonmembers paid 33 1/3 per cent. Five per cent of the recovery (in some cases, six) was paid to the Department. The Brotherhood was able to state in its answer, paragraph 6, that only "some" cases reached its Counsel, because the Department was interested only in those having high recovery potentials. At first, payments to the Department were included in the fees, but later the members made direct assignments to the Department. The investigators carried photographs of large settlement checks for exhibition to injured members and forms for the employment of the specified counsel. Their job was to solicit legal business. There were also

others, designated "bird dogs," who operated in the same manner and notified the Counsel, or the Department, or the investigator of the occurrence of accidents, with the name and address of the injured worker. While "bird dogging" was the duty of the secretary of the local lodge, other members were also engaged in this profitable enterprise, receiving as much as $1,500.00 in the largest cases. The investigators and the "bird dogs" were authorized to represent to the potential client that he would be reimbursed by the Counsel for travel and hotel expense in visiting the Counsel, and that the latter would advance money for a portion of his living expenses during the pendency of the claim. Counsel would also reimburse the member for his loss of time and travel expense in bringing an injured member to visit Counsel. Counsel paid all court costs, medical fees, court reporters' fees, and costs of appeals from his own pocket. In one year, each of two law firms reported to the Department that its recoveries totalled almost $3,000,000.00. The individual counsel did not consider that they had been employed, but that "the Department" had been employed. Counsel were, and are, named solely by the National President to serve during his pleasure. The "Legal Aid Department" was not operated as true legal aid within the accepted sense of free aid to indigent persons, nor under §54-52.1 of the Code of Virginia, 1950.

The Brotherhood's publications containing a list of its 16 Regional or Legal Counsel were sent to each member. One or more of its Counsel customarily appeared on the programs at national conventions and also at local functions, which investigators also attended.

The Brotherhood contends that it has complied with the restrictions of the Illinois decree (*In re Brotherhood of*

Railroad Trainmen (1958), 13 Ill. 2d 391, 150 N. E. 2d 163) since April 1, 1959. This decree was the result of the Brotherhood's petition for clarification of its procedures. The objectionable practices of the Legal Aid scheme were enjoined by this decree. The Brotherhood was permitted to advise the employment of counsel before settling claims, suggest competent counsel, investigate personal injury accidents at its own expense, and give its members these investigation reports. The Court also said "Such investigations can be financed directly and without undue burden by the 218,000 members of the Brotherhood." The objectionable practices herein described were prohibited.

Counsel for the Brotherhood said, in regard to Paragraph 9-C its Answer (Printed Record 436):

> "The respondent alleges that it has the legal right, it has the constitutional right to advise with its members, give them any information it has, and also to advise lawyers, generally and specifically, but not to channel business. I don't think it has that right. That would be our evidence."

Replying to a question by this court regarding "the set-up," counsel for the Brotherhood said (P. R. 447):

> "I am not trying even to justify it, because I have said in my Answer, that this is wrong—but this is clearly wrong.—It was absolutely unethical, in my opinion, but we say we are no longer doing it since April (1959), since the Illinois Court told us we could not do it."

The Brotherhood admitted many of the allegations of the bill in its answer and its statements filed by orders of this court. It has subsequently admitted, in statements by its counsel in this court and before the Supreme Court of the United States, the correctness of these allegations and the findings of fact by this court, but it says that it has not operated in this manner in the State of Virginia since April 1, 1959, and that an injunction should not be entered because the practices have ceased.

The Brotherhood's motion to strike all evidence of the complaint was accompanied by eight written motions to strike the four exhibits filed with the testimony of National President Kennedy and the testimony of ten witnesses.

The first three of the Kennedy exhibits were probably innocuous in the Brotherhood's view as they referred to acts prior to April 1, 1959, namely, the conviction in Montana of an investigator for the unauthorized practice of law, a newspaper advertisement warning the public of this man's activities, and a broadcast letter from "E. A. Stouvenel, BRT Investigator" advising all lodge brothers in his region to report all injuries to him promptly. But the last exhibit was a reprint from the Brotherhood's publication, "Trainmen News," of April 10, 1961, announcing that a party had been held in Columbus, Ohio, at which a member of a legal counsel firm had delivered a talk on "legal aid," and that he had been accompanied by a named BRT investigator.

The eight injuries described in the testimony of the ten witnesses occurred between June 6, 1959, and June 29, 1960, in seven states, (two in Indiana). The solicitation began immediately thereafter. In the Georgia case, there was competing solicitation between BRT Counsel in Atlanta

and Birmingham. In two instances, members were solicited in other states on behalf of the Henslee firm, the Regional Counsel located in Illinois. The evidence was that the scheme for solicitation was still in operation. The grounds of each motion were that the incidents did not occur in Virginia and the evidence did not show violations in Virginia. There was added parenthetically that the Brotherhood did not know what practices might be unauthorized in the foreign states. The Brotherhood at the date of filing this motion, January 23, 1962, was contending that it had been complying with the Illinois decree on a nationwide basis since April 1, 1959, for approximately 34 months. However, the record shows that its practices had been condemned previously in at least four of these seven states, namely, Ohio, Iowa, California, and Pennsylvania. In this connection, it may also be noted that between April 1, 1959, and the final decree of this court, consent decrees were entered in Oklahoma, Missouri, and Nebraska against Counsel and/or Investigators. The scheme of the Brotherhood was fully continued on the local level after April 1, 1959, and up to the closing of the Bar evidence in the fall of 1961, as if the Illinois decree had never been entered.

Notice of the appointment of Counsel continued to be carried in "The Railroad Trainmen" after April 1, 1959. Payments by Counsel to the Brotherhood continued at least through April, 1960, according to its records. The same source shows that there was paid to the Brotherhood in 1959 the sum of $158,080.06, an increase of some $1,200.00 over 1958. The first three months of 1960 show receipts of $23,410.31. Counsel were charging the previous fee of 25 per cent, but, in some instances, expenses were charged to the client. The National President continues to have the sole power of appointment and removal of Counsel.

The evidence as to the intentions of the Brotherhood is plain and beyond controversy. It continued its objectionable practices both after President Whitney's directive of 1946 and after President Kennedy's order effective on April 1, 1959. The intention of its chief counsel, McGrath, as expressed by him in 1932, prevailed on January 29, 1962, and there is reasonable ground to apprehend that the entire "plan" is now, or will be, adopted and put into effect within the jurisdiction of this court.

The scheme which was adopted to protect the railroad trainmen from "incompetent and unscrupulous" attorneys provided handsome incomes to 16 Regional Counsel who were answerable to one man only. The Legal Department was maintained by the injuries or deaths of these workers.

The Brotherhood contends that the injunction should not have been issued because it had ceased the practices described in the bill of complaint. This is similar to a plea of confession and avoidance. But such a plea will not be availing to prevent the issuance of an injunction. The evidence plainly proves that the practices begun in 1930 continued to a date only a few short months prior to the entry of the restraining order of this court (with the possible exception of furnishing free legal advice). Pursuant to a rising clamor of bar associations across the country, the Brotherhood pretended to abolish its unauthorized practice of law and unlawful practices in connection therewith in 1946 and again in 1959. It did not do so. On January 29, 1962, this court had not merely reasonable grounds to believe that these activities would be resumed, it had evidence to prove that such activities had been resumed.

A repetition of the following hornbook principles may not be inappropriate: Injunctions may be granted where the

injury is impending and threatened, or continually repeated and threatened, or probable and threatened, or certainly impending, or reasonably apprehended. It is not necessary to await the *occurrence* of the injury. Cessation of the wrongful acts, before or after suit, will not bar injunctive relief. An anticipated injury is irreparable when fair and reasonable redress is unobtainable in a court of law. *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553, 593, 43 S. Ct. 658, 663, 67 L. Ed. 1144; *Carter* v. *Carter Coal Co.* (1936), 298 U. S. 238, 56 S. Ct. 855, 80 L.Ed. 1160; *Brown* v. *Hecht Co.* (1944), 321 U. S. 321, 327, 64 S.Ct. 587, 591; *Turner* v. *Hicks* (1935), 164 Va. 612, 617, 180 S. E. 543; *Tate* v. *Ogg* (1938), 170 Va. 95, 195 S.E. 496; 43 *Corpus Juris Secundum* 436, 445, 447, Injunctions §§ 21, 22, 23; 28 American Jurisprudence 495, 522, 543, Injunctions §§7, 30, 48.

With the foregoing background this court entered its decree of January 29, 1962, which was vacated by the Supreme Court of the United States on the petition of the Brotherhood. The first question presented for review by the petition was:

> "Whether the Brotherhood of Railroad Trainmen and its members have the right to make known to its members generally and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making settlement of their claims, and second, the names of attorneys, who, in its and their opinion, have the capacity to handle such claims successfully, and whether this right is protected by the First and Fourteenth Amendments to the Constitution of the United States?"

The first error to be specified was the refusal of the Supreme Court of Appeals of Virginia to grant an appeal to the Brotherhood and to hold that the Brotherhood and its members have the protected rights stated in the first question above.

The second question to be presented, and the second error, pertained to the Federal Railway Labor Act, 45 U.S.C.A. §§151-188. The Supreme Court did not consider this in its opinion.

The Supreme Court was of the opinion that this court's decree violated the rights of the Brotherhood and its members as stated in the first question.

The petition was seemingly innocent in its statement of the question presented for review and the error of the court below. The language of the decree alleged to violate the right of free speech was never specifically identified in the petition. It was apparent that the Brotherhood was interested in more than freedom of speech.

In view of the alleged uncertainty or misconception of the opinion by Mr. Justice Black and the remand for further proceedings, it is necessary to study his opinion minutely in order to enter an appropriate decree on the evidence, and not inconsistent with that opinion. 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89.

Mr. Justice Black stated (84 S. Ct. 1114) that "we granted *certiorari* to consider this constitutional question in the light of our recent decision in *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 372 U. S. 905." He referred to the freedom of speech, petition, and assembly. But in *Button*, the activity

of *N.A.A.C.P.* was political, its aim was to eliminate racial discrimination and obtain the constitutionally guaranteed civil rights of Negroes. The association paid its regular attorneys, it did not profit financially from the attorney and client relationship, although it controlled the litigation; sometimes the client was not a member of the association; and members were not paid to induce contracts of employment. The organizations' lawsuits were for racial, not individual, benefit.

In view of the fact that the controversy in this suit relates to the personal injury claims of trainment against railroads, the following passage from *Button* (p. 429) should be recalled:

> "In the context of N.A.A.C.P. objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of *political expression.*" (Emphasis supplied).

Mr. Justice Black distinguishes (p. 1116) between the advice, on the one hand, to injured members to obtain legal services and to recommend particular attorneys and, on the other hand, the resulting channeling of legal employment. He then states that the injunction against "this particular practice" denies the members their constitutional rights. Obviously, "practice" does not refer to the result because a result is not a practice and a practice is a repeated act or a series of acts. If Mr. Justice Black had wished to state that the injunction against the channelling of legal employment deprived the members of constitutional rights, he could

have substituted "plan" for "practice." As he did not, his intention is plain—he referred to and approved only advice and recommendation. It is also noted that the denial of rights was to the members, not to the Brotherhood. The members had the constitutional rights.

Mr. Justice Black quoted (p. 1117) from *Button*: "—a State cannot foreclose the exercise of constitutional rights by mere labels." He then employs the labels "commercialization of the legal profession" and "ambulance chasing" and states that Virginia has not sought to halt these practices. Mr. Justice Black understood, from the briefs and oral arguments, and his quotation beginning at the bottom of page 1115, Virginia's position that it was attempting to stop the commercialization of the legal profession and "ambulance chasing" by the Brotherhood. He must therefore have referred to the petition for the writ which was not on the ground that the injunction prohibited unauthorized practice of law and violation of legal ethics, but on the ground that freedom of speech had been forbidden in the enjoining of advice by workers to each other to employ lawyers and their recommendation of competent lawyers, because in the next sentence he says that such recommended lawyers are not guilty of solicitation. He refers again at the close of his opinion to advice to employ attorneys, to recommendation of attorneys, and to the freedom from taint of such attorneys.

The opinion does *not* approve of unauthorized law practice. It has done no more than state that union members may advise one another to employ competent lawyers in personal injury or death cases and to recommend competent lawyers, and that lawyers so recommended are not guilty of the solicitation of law practice, and that these acts may not be prevented by a State. It further declares that Vir-

ginia has failed to show any appreciable public interest in preventing the Brotherhood from executing its plan to recommend lawyers of its selection. With all due deference, it must be settled that Virginia does not attempt in this suit to prevent "recommendation" and that the injunction of this court did not apply to "recommendation," but to unethical solicitation and the unauthorized practice of law.

The conclusion of the opinion can give the Brotherhood no comfort (p. 1118): "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending lawyers." This was precisely what the Brotherhood stated in the first question presented for review (Petition for Writ, p. 6) and the "particular practice" which the court approved at page 1116. In the eyes of the Brotherhood, the "plan" meant their whole scheme of operation—unauthorized practice, lay intermediary, fee spliting, *et cetera*. However, Mr. Justice Black approved only of the plan for advising injured workers to employ lawyers and the recommendation of specific lawyers (*cf.* first paragraph of page 1116). He then declares "Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall." The part of the decree to which the Brotherhood objects is referred to in its petition for the writ, but its specific language is nowhere mentioned or pointed out. The Brotherhood really objects to the entire decree. The intent is plain: Any part of the decree of this court which forbade the members, through the Brotherhood, from advising injured members to obtain legal services and from recommending specific lawyers violates their constitutional rights under the First and Fourteenth Amendments

and is full and void, and the decree should be accordingly modified and amended: and any lawyers accepting employment pursuant to such recommendations are similarly protected by these amendments.

I have studied the dissenting opinion by Mr. Justice Clark, concurred in by Mr. Justice Harlan (Mr. Justice Stewart not participating in the decision), and the petitions for a rehearing (denied) by Virginia State Bar, American Bar Association and 46 state bar associations. While the language regarding the commercialization of the legal profession and "ambulance chasing" may be difficult to reconcile with the holding by the Court, it is the *actual* holding of the Court on the narrow issue raised by the petition which is determinative of the true meaning of the majority opinion. The petitions for the rehearing sought clarification of the language of the opinion. Evidently, the majority of the Court, zealous as they are of the maintenance of high standards by the bar, were of the opinion that their decision does not approve of the commercialization of the legal profession and "ambulance chasing" or any of the objectionable practices of the Brotherhood in evidence in this case. It may be noted that the headnote writer for West Publishing Company, 83 S. Ct. 328, did not perceive the dire interpretation of others. The principal headnote reads "—held that injunction restraining Brotherhood from maintaining and carrying out plan for advising injured workers to obtain legal advice and for recommending specific attorneys denied members rights guaranteed by First and Fourteenth Amendments." None of the 13 classified headnotes (seven on Constitutional Law, four on Attorney and Client, one on Courts, and one on Labor Relations) indicate approval by the Court of unauthorized practice of law or violation of legal ethics.

WILLIAM A. MONCURE, JR.

Jan. 15, 1965

VIRGINIA:

IN THE CHANCERY COURT OF THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA, *ex rel.*
VIRGINIA STATE BAR

v.

BROTHERHOOD OF RAILROAD TRAINMEN

FINAL ORDER

This cause, which was by final order entered on January 29, 1962, stricken from the docket with leave for reinstatement for good cause shown came on this day to be again heard upon the papers formerly read and evidence formerly adduced; upon the Notice of Appeals and Assignments of Error of the defendant, filed herein on March 7, 1962; upon the Notice of Appeal and Additional Assignments of Error to said final decree filed herein by the defendant on March 29, 1962; upon the order of the Supreme Court of Appeals of Virginia entered June 12, 1962, refusing an appeal from said final decree of this court entered January 29, 1962; on the order of the said Court entered August 31, 1962, denying the petition of said defendant for rehearing; upon the petition of said defendant to the Supreme Court of the United States filed therein on November 8, 1962, for Writ of *Certiorari* to the Supreme Court of Appeals of Virginia; upon the transcript by Gilbert Halasz, Stenotype Reporter, of the oral arguments by counsel before the Supreme Court of the United States on January 11, 1964, filed on July 21, 1964, and made a part of the record in this cause; on the opinion of the latter court by Mr. Justice Black and the dissenting opinion by Mr. Justice Clark, both rendered April

20, 1964; upon the Petition for Rehearing of the complainant filed in the latter court on May 15, 1964; upon its order entered June 2, 1964, denying said petition and vacating the order of the Supreme Court of Appeals of Virginia entered August 31, 1962, and directing that the cause be remanded to said Court for further proceedings, not inconsistent with the said opinion; upon the order of the Supreme Court of Appeals of Virginia entered June 17, 1964, reversing the said order of this Court, and remanding this cause to this Court for further proceedings, not inconsistent with the views expressed in the said written opinion; on the motion of the complainant on July 21, 1964, for the entry of a final decree upon the record herein enjoining the defendant, Brotherhood of Railroad Trainmen, its officers, agents, servants and employees from engaging in each, every and all of the practices shown by the record herein to have been engaged in by said defendant that have not been held by the Supreme Court of the United States by its opinion rendered April 20, 1964, to be protected by the First and Fourteenth Amendments to the Constitution of the United States as set forth in said opinion and not inconsistent therewith, which said motion was accompanied by the tender of the four printed volumes of the transcript of record in this cause in the Supreme Court of the United States, October term, 1963, No. 34, said four volumes of the transcript of record being for convenience filed herein, all being made a part of the record in this cause; and was argued by counsel.

UPON CONSIDERATION whereof, it appearing that, in accordance with the directions of the Supreme Court of the United States and of the Supreme Court of Appeals of Virginia, this Court is required to revise and amend the injunction heretofore awarded by its decree of January 29,

1962, upon the facts therein found and the evidence before the Court so that the same shall not be inconsistent with the opinion of the Supreme Court of the United States and will not infringe upon those rights of the defendant and its members which are protected by the First and Fourteenth Amendments to the Constitution of the United States, to-wit: to advise injured members and the families of deceased members that they should obtain legal advice before settling claims for personal injury or death and to recommend a specific lawyer or lawyers to handle such claims, the Court adopts and reaffirms in all respects the findings of fact heretofore recited in the decree of this Court entered on January 29, 1962.

WHEREFORE, the Court doth ADJUDGE, ORDER AND DECREE that the Brotherhood of Railroad Trainmen, its officers, agents, servants, employees, members and anyone acting in its behalf, be, and they now are, permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property; from informing any lawyer or lawyers or any person whomsoever that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claims; from controlling, directly

or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; from sharing in any recovery for personal injury or death by gift, assignment or otherwise; from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; and, in general, from violating the laws governing the practice of law in the Commonwealth of Virginia and from aiding and abetting others to do so.

But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term "solicit" and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state.

The Brotherhood of Railroad Trainmen will be put upon notice of this decree by the delivery of a copy hereof to its

counsel of record and it is further ORDERED that an attested copy of this decree be served on the Secretary of each subordinate lodge of the defendant, Brotherhood of Railroad Trainmen, in the Commonwealth of Virginia from a list thereof to be supplied by counsel for defendant.

To all of the provisions of this decree the defendant objected and excepted.

The objects for which this suit was instituted and remanded having been fully accomplished, and the directions of the Supreme Court of the United States and of the Supreme Court of Appeals of Virginia having been fully complied with, it is ORDERED that the cause be stricken from the docket and the papers placed among the ended causes, properly indexed, with leave reserved to any party to have the suit reinstated for good cause shown and after such notice as the Court may require.

Enter
W.A.M.,JR.
1/15/65

BROTHERHOOD OF RAILROAD TRAINMEN

v.

COMMONWEALTH OF VIRGINIA, EX REL.
VIRGINIA STATE BAR

June 13, 1966.

Record No. 6229.

Present, Eggleston, C. J., and Spratley, Snead, I'Anson, Carrico and Gordon, JJ.

Appeal from a decree of the Chancery Court of the city of Richmond. Hon. William A. Moncure, Jr., judge presiding.

Modified, affirmed and remanded.

The opinion states the case.

Beecher E. Stallard and *John J. Naughton* (*Henslee, Monek, and Henslee,* on brief), for the appellant.

Aubrey R. Bowles, Jr. and *Aubrey R. Bowles, III* (*Bowles and Boyd,* on brief), for the appellees.

GORDON, J., delivered the opinion of the court.

Perhaps we can best delineate the issue now before us by directing attention to what has already been decided and foreclosed.

This suit began in the Chancery Court of the City of Richmond. By decree entered January 29, 1962 (the 1962 decree), the Chancellor permanently enjoined the Brotherhood from violating the laws of this Commonwealth governing the practice of law. See footnote (1) for the Chancel-

---

[1] "The defendant Brotherhood in 1930 adopted a plan designed to make available to its members, and the families of its deceased members, the professional services of attorneys selected by the Brotherhood to represent them in claims for personal injury or death arising out of railroad service.

"In order to implement this plan the Brotherhood established at its Grand Lodge a 'Legal Aid Department' (renamed on January 1, 1959, 'Department of Legal Counsel'), divided the United States into Regions, and entered into agreements with certain attorneys at law selected by the Brotherhood in each Region, called Regional Counsel (on and after January 1, 1959, called Legal Counsel).

"The defendant Brotherhood assigned one or more 'Regional Investigators' to each such counsel, who were paid by the Brotherhood.

"The operation of this plan has from its inception resulted, and still results, in channeling all, or substantially all, claims for personal injury to, or death of, members into the hands of such Regional (or Legal) Counsel.

"In furtherance of the plan the defendant Brotherhood has advised, and continues to advise, its members and the families of deceased members with respect to the legal aspects of their claims; has held out, and continues to hold out, Regional (or Legal) Counsel as the only lawyers approved by the Brotherhood to aid its members and their families; has controlled, and continues to control, directly or indirectly, the fees to be charged by such counsel to its members and their families; has furnished to such counsel prompt notice of the injury or death of a member in railroad service for the purpose of aiding such counsel in obtaining legal employment by its members and their families; has solicited, and continues to solicit, the handling of such claims by such counsel; has paid the salaries of the Regional Investigators (whose chief function is to solicit legal employment of such counsel to prosecute such claims), has advised, and continues to advise, members and the families of deceased members that the Regional (or Legal) Counsel will defray expenses and make advances during the pendency of claims; has accepted, both directly and indirectly, a share of the counsel's fees; and has countenanced the sharing of the fees of such counsel by the Regional Investigators and others who procure legal employment for such counsel.

"Various courts throughout the several States in which the practices of the defendant Brotherhood have been subjected to inquiry have reached similar findings of facts and have enjoined the continuance of such practices by the defendant Brotherhood and its Regional (Legal) Counsel.

"The defendant Brotherhood has made protestations on occasions prior to April 1, 1959, that it would discontinue the objectionable aspects of the plan and has from time to time made protestations that it has done so; yet it is admitted in the Brotherhood's answer that these practices continued up to April 1, 1959.

"The court finds that the defendant Brotherhood still adheres to the pattern and design of the plan formulated and implemented in 1930.

"And the court finds that there is reasonable ground for apprehension that this plan and course of conduct will, in furtherance of the defendant Brotherhood's avowed purpose, be adopted and put into effect in the City of Richmond, within the jurisdiction of this court.

lor's factual findings concerning the Brotherhood's illegal practices and the injunctive provisions specifying the proscribed activities.

We affirmed the 1962 decree on the ground it was plainly right.[2] But the Supreme Court of the United States disagreed. *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.ed.2d 89 (1964).

"Wherefore, the court doth Adjudge, Order and Decree that the Brotherhood of Railroad Trainmen, its officers, agents, servants and employees, and its members acting in its behalf, be, and they are now, enjoined from in any manner, directly or indirectly, engaging in the practices aforesaid in the Commonwealth of Virginia; and, in particular, from giving or furnishing legal advice to its members or their families; *from holding out lawyers selected by it as the only approved lawyers to aid the members or their families;* from informing any lawyer that an accident has occurred and furnishing the name and address of an injured or deceased member for the purpose of obtaining legal employment for such lawyer, *or in any other manner soliciting or encouraging such legal employment of the selected lawyers;* from stating or suggesting that such selected lawyers will defray expenses and make advances to clients pending settlement of claims; from controlling, directly or indirectly, fees charged or to be charged by any lawyer; from making compensation for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from in any manner sharing in the legal fees of any lawyer, or countenancing the splitting of such fees with any layman or lay agency; *and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers;* and, in general, from violating the laws governing the practice of law in the Commonwealth of Virginia." [Emphasis supplied]

---

[2] By order entered June 12, 1962, we refused the Brotherhood's petition for an appeal to this Court, thereby affirming the decree of the Chancery Court of the City of Richmond.

The Supreme Court, speaking through Mr. Justice Black, framed the issue before it on the appeal from our affirmance:

"* * * [T]he Brotherhood in this Court objects specifically to the provisions [of the 1962 decree] which enjoin it '. . . from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers . . .' "[3] (377 U.S. at 4-5, 84 S.Ct. at 1115-1116, 12 L.ed.2d at 92)

The Court then proceeded to uphold the Brotherhood's objection:

> "The Brotherhood admits that it advises injured members and their dependents to obtain legal advice before making settlement of their claims and that it recommends particular attorneys to handle such claims. The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, on behalf of its

[3] See footnote (1) for the complete injunctive provisions of the decree. The provisions quoted by Mr. Justice Black are emphasized in footnote (1).

members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention." (377 U.S. at 5, 84 S.Ct. at 1116, 12 L.ed.2d at 92-93)

The Court vacated the decree of January 29, 1962. The case was remanded to us, and we in turn remanded it to the Chancery Court of the City of Richmond, for proceedings not inconsistent with the majority opinion of the Supreme Court. After hearing argument, the Chancery Court on January 15, 1965 entered another permanent injunction against the Brotherhood, the terms of which differed in certain respect from those of the 1962 decree. The Brotherhood has prosecuted this appeal from the decree of January 15, 1965 (the 1965 decree).

The question before us is then quite narrow: Are the injunctive provisions of the 1965 decree consistent with the majority opinion of the Supreme Court in *Brotherhood of Railroad Trainmen* v. *Virginia, supra?* If so, we should affirm the decree. If not, we must amend the decree to make it consistent.

Our duty to obey the mandate of the Supreme Court is clear. In rendering a decision today, we cannot alter our course because of disagreement with Mr. Justice Black's characterization of the Brotherhood's practice of securing employment of union-selected counsel as an exercise of benevolence for the protection of union members and their families (377 U.S. at 2-4, 84 S.Ct. at 1114-1115, 12 L.ed.2d at 91-92). Nor can we alter our course because of agreement with the prediction in Mr. Justice Clark's dissenting opinion: "The potential for evil in the union's system is enormous and . . . will bring disrepute to the legal profession" (377 U.S. at 12, 84 S.Ct. at 1119, 12 L.ed.2d at 96).

[1] This brings us to the task of interpreting the majority opinion in *Brotherhood of Railroad Trainmen* v. *Virginia*, *supra*. But since our interpretation is apposite only insofar as it may bear upon the decree under review, we will first set forth the provisions of the 1965 decree at which the Brotherhood levels its main attack:

> "* * * [T]he Brotherhood of Railroad Trainmen, its officers, agents, servants, employees, members and anyone acting in its behalf, . . . are . . . permanently restrained and enjoined * * * from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property; * * * [and] from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; * * *
>
> "But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term 'solicit' and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this

state, and Canons of Legal Ethics of the American Bar Association, adopted in this state." (The entire injunction is set forth in the footnote.)[4]

---

[4] "* * * [T]he Brotherhood of Railroad Trainmen, its officers, agents, servants, employees, members and anyone acting in its behalf, be, and they now are, permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; *from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property;* from informing any lawyer or lawyers *or any person whomsoever* that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claims; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; from sharing in any recovery for personal injury or death by gift, assignment or otherwise; *from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; and, in general, from violating the laws governing the practice of law in the Commonwealth of Virginia and from aiding and abetting others to do so.*

"*But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term 'solicit' and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state.*" [Emphasis supplied]

The decree thus draws the line between forbidden solicitation and permitted recommendation. The 1962 decree, vacated by the Supreme Court, had enjoined the Brotherhood from soliciting *or* encouraging the employment of lawyers selected by the Brotherhood and from pursuing any plan that would result in the channeling of legal employment (see footnote (1)). The new decree enjoined solicitation, not encouraging or recommendation.

The Chancellor interpreted Mr. Justice Black's opinion narrowly. He interpreted the opinion as requiring only that the Brotherhood be left free to recommend approved lawyers, even though its recommendations would foreseeably result in the channeling of legal employment. He saw nothing in the opinion to prevent his restraint of the Brotherhood's solicitation of legal employment.

The difficulty of drawing a line between solicitation and recommendation is evidenced by the provisions of the 1965 decree that purport to advise what is meant by "solicitation". The decree does not attempt to define "solicitation"; it merely refers to source materials outside of the decree. The decree requires the defendants to understand truly the meaning and intendment of "solicitation" as set forth in three sources: the vast body of the common law, the statutes of Virginia and the Canons of the American Bar Association adopted in Virginia. Upon pain of contempt if their understanding should be faulty, the defendants are required to forego any action constituting solicitation as so defined.

The decree cannot stand in its present form. As said long ago by Judge Spencer Roane, a decree cannot be properly entered against persons, subjecting them to process for disobedience, "which as yet remains general and uncertain,

and the extent of which, as it relates to them, they [have] no adequate means to ascertain". *Birchett* v. *Bolling*, 5 Munf. (19 Va.) 442, 456 (1817).

[2] We should nevertheless examine Mr. Justice Black's opinion to determine whether it permits drawing a line between solicitation and recommendation in this case, and whether it permits restraint against solicitation. If so, we should not be deterred by the difficulty of drawing such a line by appropriate decretal language.

The State Bar points particularly to this language of Mr. Justice Black's opinion to sustain its position that the Chancellor's injunction against solicitation is consistent with the opinion:

> "We hold that the First and Fourteenth Amendments protect the right of members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for *recommending* specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall." [Emphasis supplied] (377 U.S. 8, 84 S.Ct. 1118, 12 L.ed.2d 94) The State Bar contends that the Supreme Court held the right to recommend protected by the Constitution; that the Court did not hold, or intend to hold, the soliciting of legal employment protected by the Constitution.

But the Court's characterization of the Brotherhood's activities as "recommending" does not justify the narrow interpretation advocated by the State Bar. The Court's

opinion forbids restraint of activities held constitutionally protected. We must leave the Brotherhood free to pursue these activities, however they may have been characterized by the Supreme Court or may be characterized under Virginia law.[5]

As recognized in the opinion, the Brotherhood carries out its activities pursuant to an established plan. The plan is obviously designed to channel legal employment to lawyers selected by it. In carrying out the plan, the Brotherhood seeks out each injured trainman or a member of his family. It not only gives general advice about the wisdom of engaging counsel, but also recommends the employment of specific Regional Counsel selected by the Brotherhood.

The Supreme Court expressly sustained the Brotherhood's objection to the restraint against its activities in "soliciting or encouraging . . . legal employment . . . of lawyers [selected by the Brotherhood]". While sustaining this objection, the Court recognized that the Brotherhood was asking protection from restraint of activities that admittedly resulted in the channeling of legal employment to particular lawyers. (See the language of Mr. Justice Black's opinion quoted in the fourth and fifth paragraphs of this opinion.)

We interpret the opinion as denying the State's right to restrain these activities. The Court held that the Brotherhood's activities fell within the protection of the First

---

[5] Compare the statement in the majority opinion, borrowed from *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429: ". . . the exercise of constitutional rights [cannot be foreclosed] by mere labels" (377 U.S. 6, 84 S.Ct.1117, 12 L.ed.2d 93).

Amendment guarantees of free speech, petition and assembly. In the Court's opinion, the State had failed to show any appreciable public interest that would justify restraint of the Brotherhood's pursuit of constitutionally protected activities.

Our interpretation of the majority opinion should come as no surprise to the bar. The opinion was generally viewed as a further Federal inroad into an area that had been regarded as reserved to the states—the regulation of the practice of law within a State. Both the Virginia State Bar and the American Bar Association so regarded the opinion or, at least, expressed grave concern that it would be so interpreted.[6]

It cannot be doubted, moreover, that the dissenting Justices of the Supreme Court so regarded the opinion. They would hardly have predicted such dire results if the majority opinion had merely reaffirmed the proposition that the right of free speech included the right to give recommendations to fellow citizens.

The Virginia Legislature did not shrink, as Mr. Justice Black did, from attaching the label "solicitation of professional employment" to activities like those conducted by the Brotherhood as shown by the record in this case. Va. Code Ann. § 54-78(c) (Supp. 1964), a part of the "running and capping" statute, provides:

---

[6] See the petition of the Virginia State Bar for a rehearing of this case by the Supreme Court and the *amicus* brief of the American Bar Association in support of the petition. The rehearing was denied. 377 U.S. 960, 84 S.Ct. 1625, 12 L.ed.2d 505 (1964).

> "'*Solicitation of professional employment*' is the obtaining or attempting to obtain for an attorney at law representation of some other person to render legal services for such other person and whereby such attorney at law will or may receive compensation; provided that neither conduct limited to mere statements of opinion respecting the ability of a lawyer, nor conduct pursuant to a uniform legal aid or lawyer referral plan approved by the Virginia State Bar, shall be deemed the solicitation of professional employment."

Whether or not the Brotherhood confines its words to those or recommendation, its conduct far more than "mere statements of opinion respecting the ability of a lawyer". Its activities, designed to obtain representation for specific lawyers, are illegal under the statute proscribing running and capping. This statute is not referred to specifically in the 1965 decree, but is incorporated by the general reference to the laws governing the practice of law in Virginia. The statute authorizes the injunction entered by the Chancellor but the injunction must yield to the mandate of the Supreme Court.

[3] We do not rule out the applicability of Virginia laws regulating the practice of law, including the running and capping statute, in other cases. We only hold that these laws cannot be invoked against the Brotherhood in this case because of the mandate of the Supreme Court. That mandate, according to the majority opinion, was issued to protect the right to conduct activities under a benevolently inspired plan concerned with the prosecution of rights under Federal statutes (the Safety Appliance Act and the Federal Employers Liability Act), where the State had failed to show an appreciable contrary public interest. Only time can tell

whether a similar mandate will be issued in a case presenting different facts.

Nor do we rule out the applicability of Virginia laws and Canons in disciplinary or injunctive proceedings against Regional Counsel or any other lawyer approved by the Brotherhood who may have solicited, or joined in or authorized solicitation of, legal employment.[7] We do not interpret this dictum in Mr. Justice Black's opinion as ruling out the applicability of Virginia laws and Canons in such proceedings: "And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge" (377 U.S. at 8, 84 S.Ct. at 1118, 12 L.ed.2d at 94). We take this statement as indicating that the Brotherhood's activities, which were held constitutionally protected under the facts of this case, do not preclude a lawyer from *accepting* employment. We do not interpret the statement as denying the State's power to enjoin or discipline attorneys who are parties to solicitation of their employment.

[4] By another assignment of error, the Brotherhood objects to the portion of the 1965 decree enjoining the Brotherhood

> "from informing any lawyer or lawyers or any person whomsoever that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer".

---

[7] The injunction in this case is directed to non-lawyers. Regional Counsel was named as a party, but was not served with process.

This injunction is directed against the furnishing of information for the purpose of enabling lawyers to solicit legal employment. The majority opinion upholds the workers' "constitutionally guaranteed right to assist and advise each other" (377 U.S. at 6, 84 S.Ct. at 1116, 12 L.ed.2d at 93). It does not, in our opinion, give the Brotherhood the right to take action that is designed to enable lawyers to solicit employment. We therefore overrule the Brotherhood's objection, except insofar as it relates to the words "or any person whomsoever". After those words are deleted, the injunction will clearly restrain only actions designed to assist lawyers in running and capping for themselves.

By its many other assignments of error, the Brotherhood complains of the Chancellor's admission of certain evidence, when this case was first heard, and of provisions of the 1965 decree, not discussed in this opinion, that are substantially the same as provisions of the 1962 decree. The Supreme Court's opinion in *Brotherhood of Railroad Trainmen* v. *Virginia, supra,* casts no doubt upon the correctness of our previous order, insofar as we overruled these objections by holding the 1962 decree plainly right.[8] No sound reason has been advanced for reversing our previous order in these respects.

The order to be entered will delete from the 1965 decree the emphasized words set forth in footnote (4). The case will be remanded to the Chancery Court for any proceeding that may be necessary to enforce the modified decree.

Modified, affirmed and remanded.

---

[8] See Footnote (2).

CARRICO, J., dissenting.

I dissent. I do not agree that the labor union involved in this case should be permitted to solicit legal business for its sixteen regional counsel and I cannot believe that the United States Supreme Court ever intended such a result to ensue.

The majority says that it finds a clear expression in the Supreme Court's opinion which requires it to hold that the union may engage in solicitation. The majority, then, has found something which the writer of that opinion failed to express in plain language and which others have found to be quite an elusive prey. See Comment, The Brotherhood Case, 51 Va. Law Review 1693.

I do not pretend to have any greater powers of clairvoyance than others who have tried to decipher the Supreme Court's opinion but, to me, all that the court held was that the union had the right to advise injured workers to obtain legal advice and to recommend specific lawyers, and that, in so advising and recommending, the union was not engaged in solicitation.

It is, of course, futile to say that I do not agree even with that holding. I am bound by it. I would not, though, extend the vague language of the opinion one iota beyond that holding.

Admittedly, my construction, as was the chancellor's, is the narrowest possible construction which may be placed upon the Supreme Court's opinion. But, in the interest of protecting the ethics of the legal profession, I believe such a construction to be both fully warranted by the opinion and crucially necessary.

The decree of the chancellor respects the union's recently declared right to advise injured workers to obtain legal advice and to recommend specific lawyers. The decree forbids solicitation. I would affirm the actions of the chancellor in those respects.

I would leave it up to the Supreme Court itself to extend its ruling to permit the union to solicit legal business, if that was its intention in the first place. While my powers of prescience are no better than my abilities of clairvoyance, I believe that there is a good chance that the court, if given the opportunity, will say that it had no such intention.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 13th day of June, 1966.

Record No. 6229

Brotherhood of Railroad Trainmen,
Appellant,

v.

Commonwealth of Virginia, ex rel.
Virginia State Bar,
Appellee.

Upon an appeal from a decree entered by the Chancery Court of the City of Richmond on the 15th day of January, 1965.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of

the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in the decree appealed from. It is therefore adjudged, ordered and decreed that the same be modified in accordance with the views expressed in the said written opinion of this court, and as so modified, the said decree is hereby affirmed, and the cause is remanded to the said chancery court for any proceeding that may be necessary to enforce the modified decree.

And it is further adjudged, ordered and decreed that the appellant recover of the appellee its costs by it expended about the prosecution of its appeal aforesaid here.

Which is ordered to be certified to the said chancery court.

A Copy,

Teste:

H. G. TURNER
Clerk.

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Friday the 9th day of September, 1966.

Brotherhood of Railroad Trainmen,
Appellant,

v.

Commonwealth of Virginia, ex rel.
Virginia State Bar,
Appellee.

Upon a Petition to Rehear

On mature consideration of the petition of the appellant to set aside the decree entered herein on the 13th day of June, 1966, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

H. G. TURNER
Clerk

BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 1 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1966

NO. 836

COMMONWEALTH OF VIRGINIA, ex rel
Virginia State Bar,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR RESPONDENT IN OPPOSITION

BEECHER E. STALLARD
Central Nat. Bank Bldg.
Richmond, Virginia 23219
EDWARD B. HENSLEE, JR.
JOHN J. NAUGHTON
120 West Madison Street
Chicago, Illinois 60602
Counsel for Respondent.

January 3, 1967

KEENAN PRINTING COMPANY

BLANK

PAGE

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Denying the Writ	6
1. The 1965 Decree is Invalid Under Virginia Law	6
2. There is no Conflict of Decisions as to the Meaning of This Court's Opinion	7
3. There is no Ambiguity in This Court's Opinion	10
4. There are no Substantive Evils Justifying an Injunction	13
5. This Court Should not Issue an Advisory Opinion	14
Conclusion	15

CITATIONS

Cases:

Brotherhood of Railroad Trainmen v. Virginia, 377 U. S. 1, 84 S. Ct. 1113, 12 L. ed. 2d 89 (1964) 4-5

Dombey, Tyler, Richards & Greiser v. D.T. & I.R. Co., (C.A. 6) 351 F. 2d 121, 128 (1965) 9

Illinois State Bar Association v. United Mine Workers of America, Dist. 12, 35 Ill. 2d 111, 219 N.E. 2d 503 (1966) 8

N.A.A.C.P. v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. ed 2d 405 12

State v. Williams (Fla. 1966), 183 S (2d) 537, Cert. denied, docket No. 160, 87 S. Ct. 42 9

Miscellaneous:

Vol. III, Martindale-Hubbell Law Directory, p. 1909-B (1966) 9

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1966

NO. 836

COMMONWEALTH OF VIRGINIA, ex rel.
Virginia State Bar,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR RESPONDENT IN OPPOSITION

The petition for writ of certiorari presents no new question for this Court to decide. This Court has already decided the issues in this cause in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 84 S. Ct. 1113, 12 L. ed. 2d 89 (1964). Petitioner by its wording of the question presented seeks to broaden the issues in this case so as to require this Court to issue an advisory opinion.

OPINIONS BELOW

On remand from this Court, the Chancery Court of the City of Richmond, Virginia filed an opinion on January 15, 1965 which is printed in Appendix B to the petition at pages 15 and 19. The opinion of the Supreme Court of Appeals of Virginia, reversing the Chancery Court of the City of Richmond, Virginia, filed on June 13, 1966, is printed in Appendix B to the petition at pages 19 to 35 and is reported in 207 Va. 182, 149 S.E. 2d 265.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Will this Court issue another opinion delineating in detail the nature and extent of its holding in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1; 84 S. Ct. 1113, 12 L. ed. 2d 89, with particular reference to its determination of where the line between the Brotherhood's rights of freedom of speech and freedom of association and the rights of the Virginia State Bar has been drawn? Will this Court issue an advisory opinion sharply defining the rights of the parties in situations as to which no evidence has been presented?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States of America are set forth in Appendix A to the Petition, at page 1 thereof.

STATEMENT OF THE CASE

Petitioner commenced this action in June 1959 by filing its Bill of Complaint which, in paragraphs 5 and 6 thereof, alleged as follows (R. Vol. B-1, pp. 2-3):

(5) "The Brotherhood maintains what it calls a 'Legal Aid Department' which, while collecting information that is valuable to those who are interested in the welfare of railroad employees, also solicits business through the means of certain of its employees and members of its lodges for various attorneys at law throughout the United States which have been selected by the Legal Aid Department and designated by said department as Regional or Legal Counsel.

(6) "The solicitation of business for Regional or Legal Counsel has been conducted in the following manner: when a lodge member is injured or killed in the course of his employment, he or his family or estate notifies his lodge and his lodge, acting through its secretary or some other member, notifies the Legal Aid Department of the injury or death; the Legal Aid Department immediately notifies Regional or Legal Counsel of the injury or death; Regional or Legal Counsel, in turn, sends the Regional Investigator, a person who is employed and paid by both Regional or Legal Counsel and by the Brotherhood, to investigate the happening; in many cases both the lodge to which the injured man belongs or to which the deceased belonged, acting through its officers and members and the Regional Investigator, advise the injured person or his family, or the family or estate of the deceased, that the claim against the injured or deceased member's employer should not be settled without consulting Regional or Legal Counsel; and the Regional Investigator then arranges for the injured party

> or family of the deceased to execute the necessary agreements retaining the services of Regional or Legal Counsel on forms which he carries with him."

Said practices were alleged to constitute the unauthorized practice of law. The conduct alleged was substantially admitted by the Respondent but the legal conclusions were denied. (R. Vol. B-1, pp. 5-6)

At the trial, Petitioner presented transcripts of previous cases in other jurisdictions occurring as far back as 1932. Respondent's reports also were introduced both preceding and succeeding the establishment of the Legal Aid Department of Respondent in 1930. Depositions were introduced concerning 8 injuries to members of the Respondent which occurred throughout the country. None of these injuries occurred in Virginia and none of those Brotherhood members were residents of Virginia. Indeed, no evidence was introduced concerning any accidents, injuries or occurrences in the State of Virginia.

The Chancery Court of the City of Richmond entered its original decree on January 29, 1962 enjoining the Brotherhood from, among other things, (R. Vol. B-1, pp. 25-28):

> ". . . soliciting or encouraging . . . legal employment of selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular or group of lawyers . . ."

The Supreme Court of Appeals of Virginia denied leave to appeal and denied a rehearing (R. Vol. B-1, pp. 35-36). After certiorari granted, this Court reversed. *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, 84

S. Ct. 1113, 12 L. ed. 2d 89. After rehearing was denied, this Court remanded the cause for further proceedings not inconsistent with its opinion (R. Vol. A. p. 10).

The Chancery Court of the City of Richmond issued a new injunction on January 15, 1965, at the same time issuing an opinion (Rec. Vol. A, pp. 12 through 25; Appendix B to the Petition, pp. 1 through 19.)

In that decree, the Chancery Court of the City of Richmond enjoined the Brotherhood: (R. Vol. A, pp. 24-25; Appendix B to the Petition, pp. 17-18)

> ". . . from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property, . . . from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so. . . .
>
> "But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term 'solicit' and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state."

Petition for Leave to Appeal was granted and the Supreme Court of Appeals of Virginia reversed the 1965 injunction. The court first held that the decree could not stand in its present form under Virginia law. (Appendix B to Petition, p. 27) The court then found the conduct of the Brotherhood to be "solicitation of professional employment" as defined by a Virginia statute but squarely held that the injunction authorized by that statute must yield to the mandate of this Court. (Appendix B to the Petition, pp. 29-31)

REASONS FOR DENYING THE WRIT

1. The 1965 Decree is Invalid Under Virginia Law.

The Supreme Court of Appeals of Virginia held that the 1965 decree could not stand in its present form under Virginia law. In so holding, the court stated in Appendix B to the Petition, pp. 27-28:

> "The Chancellor interpreted Mr. Justice Black's opinion narrowly. He interpreted the opinion as requiring only that the Brotherhood be left free to recommend approved lawyers, even though its recommendations would foreseeably result in the channeling of legal employment. He saw nothing in the opinion to prevent his restraint of the Brotherhood's solicitation of legal employment.
>
> "The difficulty of drawing a line between solicitation and recommendation is evidenced by the provisions of the 1965 decree that purport to advise what is meant by 'solicitation'. The decree does not attempt to define 'solicitation'; it merely refers to source materials outside of the decree. The decree requires the defendants to understand truly the meaning and intendment of 'solicitation' as set forth in three sources: the vast body of the common law, the statutes of Virginia and the Canons of the American Bar As-

sociation adopted in Virginia. Upon pain of contempt if their understanding should be faulty, the defendants are required to forego any action constituting solicitation as so defined.

"The decree cannot stand in its present form. As said long ago by Judge Spencer Roane, a decree cannot be properly entered against persons, subjecting them to process for disobedience, 'which as yet remains general and uncertain, and the extent of which, as it relates to them, they (have) no adequate means to ascertain'. *Birchett* v. *Bolling,* 5 Munf (19 Va.) 442, 456 (1817)"

Thus it is seen that this case is not as simple as Petitioner would have it (Petition, p. 18) in its contention that the 1965 decree says plainly that the Brotherhood may recommend selected lawyers but may not solicit business for them. The highest Virginia court has said such decree is not an understandable one under Virginia law. The Petitioner's contention that it possesses a clear decree, and an unclear issue which will be helpful in resolving questions of national importance is without merit whether considered in light of this Court's previous opinion or in light of Virginia law.

2. There Is No Conflict Of Decisions As To The Meaning Of This Court's Opinion.

Petitioner dwells at length (Petition, pp. 6-14) on its contention that subsequent decisions have interpreted this Court's opinion in the same way as the Chancellor did in writing his 1965 opinion and in issuing the 1965 decree. After examination, the cases cited by Petitioner are seen to be completely different than the narrow viewpoint of the Chancellor. As the Virginia Supreme Court states, the Chancellor's interpretation is the very narrowest interpretation that can be made as to the meaning and effect

of this Court's opinion. The cases cited, on the other hand, give "breathing room" to the opinion. *Illinois Bar Association* v. *United Mine Workers of America, Dist. 12,* 35 Ill. 2d 111, 219 N.E. 2d 503 (1966) deals with a union which had a lawyer on its payroll representing its members in workmen's compensation claims without any fees being paid by the injured members. The case thus presented a square question as to whether unions can have house counsel to the same extent as corporations and insurance companies. Deciding that the union could not, the Supreme Court of Illinois did not narrowly construe this Court's opinion. Instead, it limited its decision to the "house counsel" issue stating in 219 N.E. 2d 503 at page 509:

> "The court there (377 U.S. 5, n. 9, 84 S. Ct. 1113) specifically pointed out that the railroad trainmen were objecting to only those portions of the decree encompassed by the language of the holding, as the brotherhood had denied that it was engaging in practices forbidden by our decree in In Re Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163. Accordingly, that holding does not purport to overturn our decision precluding any financial connection between the brotherhood and the counsel selected by it to handle individual membership claims. As a consequence, we do not read Virginia Railroad Trainmen as constitutionally protecting the conduct we are concerned with here, i. e. employment on a salary basis by a labor union of counsel to represent individual members' claims before the Industrial Commission. The circuit court decree in question here does not attempt to restrain the union from advising its members to seek legal advice or from recommending particular attorneys thought competent to handle workmen's compensation claims. As related earlier, our decision in *In Re Brotherhood of Railroad Trainmen* specifically allows such conduct."

Other opinions cited by the Petitioner are wholly inadequate bases for Petitioner's contention. *State* v. *Williams* (Fla. 1966), 183 S (2d) 537, cert. denied, docket No. 160, 87 S. Ct. 42, is a case where an attorney sought a writ of prohibition to prevent his prosecution for violations of a statute making the solicitation of legal business a criminal offense. He had no connection with any union or with any other group involved in providing or facilitating the providing of legal services. The court limited its opinion by saying at page 540:

> "Our decision herein is limited to upholding the validity of said statute and to a denial of the writ and is not otherwise dispositive of any other question of law or fact that have been or may be raised in the instant case."

Likewise, *Dombey, Tyler, Richards & Greiser* v. *D.T. & I.R. Co.*, (C.A. 6) 351 F. 2d 121 (1965) is no authority for Petitioner's contention. The court there held that the Brotherhood opinion protected the "solicitation" of Dombey's employment by a union representative. See 351 F. 2d 128. Its use of the same word in connection with the Chicago Brotherhood counsel does not infer that such conduct was unprotected or illegal. Moreover, such issues were not contested since they were irrelevant to the suit for fees after the railroad defendant had settled the injury case behind the back of plaintiff's attorney. The irrelevancy of this case to Petitioner's contention is so apparent that it seems to be inserted only because the Chicago law firm has been of counsel in this case. Such fact is as irrelevant as the fact that counsel for the State Bar in this case is, and has been for years, Division Counsel for the Chesapeake & Ohio Railway Company, Vol. 3, *Martindale-Hubbell Law Directory*, p. 1909-B (1966).

It is difficult to understand the position of the State Bar at this point. The State Bar adamantly insists that the decree below makes a perfectly clear distinction between "solicitation" and "recommendation". (It will be remembered that this is the identical contention which the State Bar made before this Court in seeking to sustain the 1962 decree.) Contrary to the actual holding, the State Bar insists that its cited cases make the same distinction. Since the cases do not support this contention, there is no basis for the assertion that a conflict of decisions exists.

3. There Is No Ambiguity in This Court's Opinion.

This Court issued its opinion on the four volume Transcript of Record before it. As previously mentioned, that Record was devoid of evidence concerning Brotherhood activities in Virginia. Petitioner pled that a local contact was made by one of Respondent's agents recommending the employment of the Brotherhood's designated attorneys in all personal injury and death cases (R. Vol. B-1, p. 23). Respondent admitted that this occurred in some cases (R. Vol. B-1, p. 5). The 1962 decree enjoined such practices and this Court's opinion set aside that injunction. There is nothing ambiguous in that holding or in this Court's opinion.

Any ambiguity in the case exists because of the untenable contentions advanced by the Petitioner. It has sought to enjoin the Brotherhood on a record based on bits and snatches of evidence from other cases against the Brotherhood as far back as 1932 and from selected claims in 1960 and 1961. These cases occurred throughout the United States but not in Virginia. Petitioner even introduced evidence proffered by another State Bar in a case which resulted in a Consent Decree. The Brotherhood has consistently taken the position that no injunction can be based on that type of evidence.

However, this Court did not consider that contention of the Brotherhood when it struck down the phrases of the 1962 decree prohibiting "soliciting" and "channeling" (See footnote 9, R. Vol. A, p. 4).

Immediately after this Court's opinion was filed, Petitioner here sought a rehearing claiming that this Court's opinion was ambiguous and it has consistently so claimed ever since. The fact of the matter, however, is that the Record has not changed since the opinion of this Court was issued. The only rational basis for any injunction has been on the "channeling" theory adopted in the 1962 decree. (This may only be because the Brotherhood admitted such channeling). That theory, of course, is obliterated by this Court's opinion. Since its obliteration, the only proper action for the court below would be the dismissal of the Complaint. The court below, however, stated that the question before it was whether the injunctive proceedings were consistent with the opinion of this Court and that it must amend the decree to remedy any inconsistency (Appendix B to the Petition, p. 24). It further held that all other objections to the other provisions of the 1965 decree were not supported by "sound reason" (Appendix B to the Petition, p. 33). On the point in issue here, the court stated, in a paragraph misquoted at page 31 of Appendix B to the Petition, as follows:

> "Whether or not the Brotherhood confines its words to those of recommendation, its conduct includes far more than 'mere statements of opinion respecting the ability of a lawyer'. Its activities designed to obtain representation for specific lawyers, are illegal under the statute proscribing running and capping. This statute is not referred to specifically in the 1965 decree, but is incorporated by the general reference to the laws governing the practice of law in Virginia. The statute authorized the injunction entered by the

> Chancellor, but the injunction must yield to the mandate of the Supreme Court."

When this paragraph is correctly quoted and considered, it is apparent that the Virginia court has not created any ambiguity. It is plain that that court is stating that the Virginia statute would forbid any "channeling". It is further stating that a group practice of recommending the group's lawyer would amount to "solicitation" within the meaning of the Virginia statute. This, of course, is apparent when another case involving the Virginia statutes is considered. In that case, *NAACP* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. ed. 2d 405, the Virginia Supreme Court had made it clear that it was the grouping of individual recommendations that created the vice prohibited by the Virginia statute. That prohibition, of course, was struck down by this Court. In the *Button* opinion, the court held that the invalidation of the statute as applied was not based on the particular nature of the group involved. Because of such invalidation, the Virginia court in this case may have been stretching the *Button* opinion to the advantage of the State Bar in permitting its application against another group providing legal services.

Be that as it may, there is no ambiguity in either this Court's opinion or in the opinion of the court below. The Petitioner's contention here is itself an ambiguous one. In fact, that contention is the same one struck down in *NAACP* v. *Button*, and again in this Court's opinion in this case for, as this Court said in both cases, "A State cannot foreclose the exercise of constitutional rights by mere labels". Petitioner's attempt to use an invidious label as a substitute for evidence should again be struck down.

4. There Are No Substantive Evils Justifying An Injunction.

Although the court below directs that an injunction be issued, it is apparent that there are no substantive evils justifying an injunction as this Court held that the State had failed to show any appreciable public interest to justify the prohibition of the Brotherhood's plan. Such a principle must be pressed, for it is clear that an injunction absent evidence may lead to the establishment of tyranny by the judiciary. It was with that thought in mind that Respondent filed, not a Petition for Rehearing, but a "Petition for Modification of Opinion or Rehearing" in the court below. In that Petition of 4 pages, Respondent contended that the Virginia Supreme Court of Appeals proceeded from a false premise in that it assumed that the Complaint could not be dismissed and that the Brotherhood must be placed under an amended decree of injunction. That court felt that the mandate of this Court required such result. The rehearing portion of that Petition was directed solely to the court's holding that attorneys would be subject either to injunction or discipline despite this Court's opinion. It was urged that such a holding could not be based on the record of the case which was devoid of either "evidence or a claim by the State Bar that any brotherhood lawyers were engaged in running or capping for themselves".

Though it is clear that there are no substantive evils permitting the State to regulate the conduct of the Brotherhood, the State Bar with obvious desperation asserts that the dire predictions in its rehearing petition in this Court have come to pass and, as evidence therefor, cites passages from various Briefs filed in this case in the courts below. The State Bar does not suggest, however, how it can be harmed if its contention were true since an

injunction has been ordered by the Supreme Court of Appeals against those other practices which the State Bar finds so abhorrent. It concludes by being shocked that the Brotherhood asserts that its constitutional rights must be given "breathing room". This, of course, is a quoting of that phrase from the opinions of this Court. The fact that the State Bar is shocked demonstrates how little attention it has paid to this Court's opinions.

5. This Court Should Not Issue An Advisory Opinion.

The State Bar claims that this matter is one of national importance and that this Court has a duty to answer all of the theoretical questions which the State Bar propounds. Even if this Court desired to do so, it is respectfully suggested that it is impossible to write an opinion showing "proper balance" between the constitutional rights of association members and the right of the State to regulate the practice of law. The fact remains that this must always be so and that cases should be decided on a case-by-case basis not to mention the constitutional problems caused by attempting to announce guide lines when no "case or controversy" exists.

Having lost its case on its first appearance before this Court, the State Bar filed a Petition for Rehearing and that Petition was denied. Now, by means of its Petition for Certiorari, the State Bar seeks another rehearing. This Court should refuse that request.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BEECHER E. STALLARD
Central Nat. Bank Bldg.
Richmond, Virginia 23219

EDWARD B. HENSLEE, JR.

JOHN J. NAUGHTON
120 West Madison Street
Chicago, Illinois 60602

Counsel for Respondent.

January 3, 1967